No. 96-563

Supreme Court, U.S.
FILED
JAN 16 1997
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

HARTLEY MARINE CORP., THE OHIO RIVER COMPANY, and CROUNSE CORPORATION,

Petitioners,

v.

JAMES H. PAIGE III, STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondent.

On Petition for Certiorari to the West Virginia Supreme Court of Appeals

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Darrell V. McGraw, Jr.
Attorney General

Silas B. Taylor
Counsel of Record
Managing Deputy Attorney General
Stephen Stockton
Assistant Attorney General
State Capitol, Room W-435
Charleston, West Virginia 25305
(304) 558-2522

Attorneys for Respondent

---

20 pp

QUESTIONS PRESENTED

Respondent State Tax Commissioner of the State of West Virginia takes exception to the provocative wording of the questions presented by Petitioners Hartley Marine Corporation, the Ohio River Company, and Crounse Corporation in their petition for certiorari, and therefore restates them simply as follows:

QUESTIONS: 1) Whether West Virginia's use tax on consumption of fuel by motor carriers operating within the State, as applied to river barges operating on waterways within the State, is prohibited by the Northwest Ordinance of 1787, the Virginia Compact of 1789, or the Duty of Tonnage, Supremacy, or Commerce Clauses of the United States Constitution; and 2) whether the tax is preempted by federal statutes prohibiting tolls on federally owned facilities and imposing fuel use taxes on vessels operating in inland waterways.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES CITED iii

TEXT OF PERTINENT STATUTES OMITTED FROM THE PETITION iv

OPINIONS BELOW 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 5

ARGUMENT 6

THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT, NOR DOES IT CONFLICT WITH THE HOLDINGS OF OTHER FEDERAL AND STATE COURTS 6

I. Northwest Ordinance And Virginia Compact 6

II. Duty Of Tonnage.. 11

III. Supremacy Clause And Preemption. 14

IV. Commerce Clause. 15

CONCLUSION 18

TABLE OF AUTHORITIES CITED

Cases **Page**

Allphin v. Ohio River Co., 306 S.W.2d 94 (Ky. 1957) 9
American Barge Line Co. v. Koontz, 136 W. Va. 747, 68 S.E.2d 56 (1951), overruled on other grounds by *Western Maryland Railway Co. v. Goodwin*, 167 W. Va. 804, 282 S.F 2d 240 (1981) 4, 6
American Commercial Barge Line Co. v. Marcum, 360 S.W.2d 134 (Ky. 1962) 12
Benham v. Indiana, 637 N.E.2d 133 (Ind. 1994) 14
Bingaman v. Golden Eagle Western Lines, Inc., 297 U.S. 626 (1936) 17
Clyde Mallory Lines v. Alabama, 296 U.S. 261 (1935) 10, 12
Columbia Gulf Transmission Co. v. Broussard, 653 So.2d 522 (La. 1995) 16
Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 14, 16, 17
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 6, 15-17
Director of Revenue v. Superior Aircraft Leasing Co., Inc., 734 S.W.2d 504 (Mo. 1987) 16
Economy Light Co. v. United States, 256 U.S. 113 (1921) 8, 9
Escanaba Co. v. Chicago, 107 U.S. 678 (1883) 7-10
Hartley Marine Corp. v. Mierke, 474 S.E.2d 599 (W. Va. 1996) 2, 14, 16, 18
Helson v. Kentucky, 279 U.S. 245 (1929) . . . . . *passim*
Henneford v. Silas Mason Co., 300 U.S. 577 (1937) 13
Huse v. Glover, 119 U.S. 543 (1886) 7, 8, 10, 11

In re Los Angeles Lumber Products Co., 45 F. Supp. 77 (S.D. Cal. 1942) 13
Jean v. Nelson, 472 U.S. 846 (1985) 10
Master Craft Engineering, Inc. v. Dept. of Treasury, 366 N.W.2d 235 (Mich. App. 1985) 16
Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976) 13
Sands v. Manistee River Improvement Co., 123 U.S. 288 (1887) ..... *passim*
Spector Motor Service v. O'Connor, 340 U.S. 602 (1951) 15
Waterways Association of Pittsburgh v. Rose, Civil Action No. 84-C-2814 (Cir. Ct. Kanawha County, April 18, 1986), appeal refused (W. Va. Sup. Ct. App. Feb. 3, 1987), dismissed for want of a properly presented federal question, 484 U.S. 803, 108 S. Ct. 48, 98 L. Ed. 2d 13 (1987) 4
Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940) 18

Statutes

Northwest Ordinance of 1787 ..... *passim*
Virginia Compact of 1789 ..... *passim*

United States Code:

33 U.S.C. § 5 14

West Virginia Code:

W. Va. Code § 11-15A-2 3
W. Va. Code § 11-15A-2(a) 3
W. Va. Code § 11-15A-10a . . . . . iv, 3, 13
W. Va. Code § 11-15A-13 2
W. Va. Code § 11-15A-13(d) 3
W. Va. Code § 11-15A-13(d)(1) 3
W. Va. Code § 11-15-3(b) 3
W. Va. Code § 11-15-18 . . . . . iv, 2
W. Va. Code § 11-15-18(c)(9) 12

United States Constitution:

U.S. Const. Const. art. I, § 10 . . . . . 6, 11

TEXT OF PERTINENT STATUTES OMITTED FROM THE PETITION

West Virginia Code § 11-15-18, provides, in pertinent part:

(a) *General.* -- All sales of gasoline or special fuel by distributors or importers, except when to another distributor for resale in this state, when delivery is made in this state, shall be subject to the tax imposed by this article, notwithstanding any provision of this article to the contrary. Sales of gasoline or special fuel by a person who paid the tax imposed by this article on his purchases of fuel, shall not thereafter be again taxed under the provisions of this article. This section shall be construed so that all gallons of gasoline or special fuel sold and delivered, or delivered, in this state are taxed one time.

(b) *Measure of tax.* -- The measure of tax on sales of gasoline or special fuel by distributors or importers shall be the average wholesale price as defined and determined in subsection (c), section thirteen [§ 11-15A-13(c)], article fifteen-a of this chapter. For purposes of maintaining revenue for highways, and recognizing that the tax imposed by this article is generally imposed on gross proceeds from sales to ultimate consumers, whereas the tax on gasoline and special fuel herein is imposed on the average wholesale price of such gasoline and special fuel; in no case, for the purposes of taxation under this article, shall such average wholesale price be deemed to be less than ninety-seven cents per gallon of gasoline or special fuel for all gallons of gasoline and special fuel sold during the reporting period, notwithstanding any provision of this article to the contrary.

West Virginia Code § 11-15A-10a, provides;

(a) A person is entitled to a credit against the tax imposed by this article on the use of a particular item of tangible personal property equal to the amount, if any, of sales tax lawfully paid to another state for the acquisition of that property: Provided, That the amount of credit allowed shall

not exceed the amount of use tax imposed on the use of the property in this state.

(b) For purposes of this section:

(1) "Sales tax" includes a sales tax or compensating use tax imposed on the use of tangible personal property by the state in which the sale occurred; and

(2) "State" includes the District of Columbia but does not include any of the several territories organized by Congress.

(c) This section shall apply to claims for refund or credit of use tax filed after the thirty-first day of August, one thousand nine hundred eighty-six, for taxable purchases made on or after the first day of July, one thousand nine hundred eighty-five, that were legally subject to a sales tax or compensating use tax paid in another state and then also taxed under this article. (1986, 2nd Ex. Sess., c.6.)

No. 96-563

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

HARTLEY MARINE CORP., THE OHIO RIVER COMPANY, AND CROUNSE CORPORATION,

Petitioners,

v.

JAMES H. PAIGE III, STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondent.

On Petition for Certiorari to the West Virginia Supreme Court of Appeals

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Since the filing of the Petition for a Writ of Certiorari (hereinafter, "the Petition"), the decision of the Supreme Court of Appeals of West Virginia has been reported at 474 S.E.2d 599 (W. Va. 1996).

STATEMENT OF THE CASE

Respondent accepts as generally accurate Petitioners' rendition of the facts in this case as set forth in the Petition. However, Respondent further states that the parties stipulated below that between mile markers 40 and 317 on the Ohio River, Petitioners are travelling in West Virginia approximately eighty-five percent of the time and that Petitioners calculated their fuel use tax liability on the basis of eighty five percent of the mileage between those mile markers. *Hartley Marine Corp., et al. v. Mierke*, 474 S.E.2d 599, 602 n.5 (W. Va. 1996); Joint Stipulation ¶ 12. Petitioners operate a mid-stream refueling facility at Point Pleasant, West Virginia. (Transcript of Hartley Marine administrative hearing at 24; hereinafter, "Hartley Tr. at __.") Petitioners operate a rail-to-river barge coal terminal at Kenova, West Virginia. (Transcript of Ohio River Company administrative hearing at 25; hereinafter, "ORCO Tr. at __.") All Petitioners either own or lease property in West Virginia. Hartley Tr. at 24-25; ORCO Tr. at 25-26; Crounse Tr. at 53-55.

Petitioners are barge companies that operate in West Virginia, and are defined (along with over-the-road transporters) as motor carriers for purposes of West Virginia's sales and use taxes on gasoline and special fuel. W. Va. Code §§ 11-15A-13, 11-15-18.[1] West Virginia imposes a use tax on the use by motor carriers in this State of gasoline or special fuel which would be subject to sales taxes if purchased within West Virginia. The rate of the use tax and its other measures are identical to the parallel provisions of the sales tax imposed by W. Va. Code § 11-15-18. W. Va. Code § 11-15A-13. The amount of fuel used in West Virginia is calculated by determining the total number of miles traveled within and

---

[1]Section 11-15A-13 of the West Virginia Code, and certain portions of Section 11-15-18, are set forth in Appendix I of the Petition at pp. 126a-131a. The remaining relevant portions of Section 11-15-18 appear herein at p. vi.

without West Virginia, and applying the resulting percentage for miles traveled within West Virginia to the total amount of fuel used in the motor carrier's operations both within and without West Virginia. W. Va. Code § 11-15A-13(d)(1). The number of gallons of fuel used in West Virginia is applied to the average wholesale price as determined by statute to calculate the sales price of the fuel used, and the five percent use tax is applied to that amount. W. Va. Code §§ 11-15A-13(d), 11-15A-2.[2] If the motor carrier paid any state sales tax on the fuel in the state in which the fuel was purchased, then a credit in the amount of that tax is provided against West Virginia's fuel use tax. W. Va. Code § 11-15A-10a.[3]

Petitioners claim that West Virginia's fuel use tax is not valid for a number of reasons. All of the multiple grounds for certiorari claimed by Petitioners in this case have been presented to this Court previously. Arguments addressing the Northwest Ordinance, the Virginia Compact, the Duty of Tonnage, Supremacy and Commerce Clauses, and federal

---

[2]The relevant portion of W. Va. Code § 11-15A-2(a) provides that, "[a]n excise tax is hereby levied and imposed on the use in this state of tangible personal property or taxable services, to be collected and paid as hereinafter provided, at the rate of six percent of the purchase price of such property or taxable services, beginning on the first day of March, one thousand nine hundred eighty-nine, except that sales of gasoline and special fuel shall remain taxable at five percent." The five percent use tax rate applied to use of gasoline and special fuel is identical to the sales tax rate applied in W. Va. Code § 11-15-3(b), the relevant portion of which provides that, "the general consumer sales and service tax imposed by this article shall be at the rate of six cents on the dollar of sales or services, excluding gasoline and special fuel sales, which remain taxable at the rate of five cents on the dollar of sales."

[3]The complete text of W. Va. Code § 11-15A-10a is quoted at p. vi-vii herein.

preemption were all presented in a 1987 appeal from West Virginia which this Court dismissed for want of a properly presented federal question.[4] See *Waterways Association of Pittsburgh v. Rose*, Civil Action No. 84-C-2814 (Cir. Ct. Kanawha County, April 18, 1986), appeal refused (W. Va. Sup. Ct. App. Feb. 3, 1987), dismissed for want of a properly presented federal question, 484 U.S. 803, 108 S. Ct. 48, 98 L. Ed. 2d 13 (1987).[5]

Contrary to Petitioners' unsupported assertion in their Statement of the Case, the West Virginia Supreme Court of Appeals extensively relied upon United States Supreme Court precedent in rejecting each of Petitioners' multiple attacks on the fuel use tax at issue in this case. In claiming that the West Virginia Supreme Court of Appeals relied only on "one of its own decisions" in holding that the Northwest Ordinance and Virginia Compact have been superseded by the United States Constitution, Petitioners failed to reveal that the case cited, *American Barge Line Co. v. Koontz*, 136 W. Va. 747, 68 S.E.2d 56 (1951); overruled on other grounds by *Western Maryland Railway Co. v. Goodwin*, 167 W. Va. 804, 282 S.E.2d 240 (1981), extensively quoted and relied upon decisions of the United States Supreme Court, including those relied upon by the Petitioners herein. The decision by the West Virginia Supreme Court of Appeals in this case is not a dangerous aberration as painted by Petitioners, but rather is a deferential and accurate reflection of the controlling precedent of this Court.

---

[4]In the courts below in this case, Petitioners also claimed that West Virginia's use tax on gasoline and special fuel violates the Equal Protection and Due Process Clauses. Petitioners did not submit those issues in their petition for certiorari in this case.

[5]The issue of federal preemption had not been made before the lower courts in the 1987 *Waterways Association* case, but was raised for the first time in the appeal to this court, which was rejected.

SUMMARY OF ARGUMENT

Upon entering the Union as a State in 1863, West Virginia acquired the same power to regulate navigable waters within its borders as every other state, and the territorial provisions of the Northwest Ordinance and the Virginia Compact were superseded by the nationwide provisions of the United States Constitution. *Sands v. Manistee River Improvement Co.*, 123 U.S. 288 (1887). To apply the strictures of these two territorial documents to West Virginia, and not to other states, would violate West Virginia's right to be treated no differently than every other state admitted to the Union. The provisions of the Northwest Ordinance and the Virginia Compact must be construed as superseded by, or subsumed within, the Commerce and Duty of Tonnage Clauses of the United States Constitution, which address the same concerns in an even-handed manner. Even if the Northwest Ordinance and the Virginia Compact still apply so as to restrict West Virginia's right to levy a "tax, duty or impost," the fuel use tax at issue in this case is not the sort of tax contemplated by either document.

The West Virginia gasoline and special fuel use tax is not a fee levied on the privilege of entering, or navigating upon, the State's waterways. Rather, it is a broad-based tax levied upon the use of gasoline or special fuels by all motor carriers within the boundaries of the State. Accordingly, the fuel use tax is not a duty of tonnage forbidden by Article I, Section 10, Clause 3 of the United States Constitution.

Federal statutes which narrowly prohibit "tolls or operating charges" do not prohibit a state tax on the use of gasoline and special fuel within the boundaries of the state. Furthermore, the federal government has not occupied the field regarding waterways or taxation of fuel use to the point that West Virginia's use tax on gasoline and special fuels cannot coexist with federal regulation.

The measure of West Virginia's fuel use tax is directly related to the taxpayer's contact with the State, and thus the

tax does not violate the fourth prong of the Commerce Clause test set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

ARGUMENT

THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT, NOR DOES IT CONFLICT WITH THE HOLDINGS OF OTHER FEDERAL AND STATE COURTS

I. Northwest Ordinance And Virginia Compact.

Petitioners claim that the West Virginia fuel use tax violates the Northwest Ordinance of 1787 and the Virginia Compact of 1789, because those documents declared that the Ohio River and its tributaries shall remain "forever free" or "free." Relying on decisions of this Court, the West Virginia Supreme Court of Appeals rejected this argument on multiple grounds over 45 years ago. *American Barge Line Co. v. Koontz*, 136 W. Va. 747, 68 S.E.2d 56 (1951), overruled on other grounds, *Western Maryland Railway Co. v. Goodwin*, 167 W. Va. 804, 282 S.E.2d 240 (1981). In *American Barge*, West Virginia's highest court found that the Act of Congress which conditionally admitted West Virginia as a State placed West Virginia "on an equal footing with the original States in all respects whatever," and thus the Northwest Ordinance and Virginia Compact were superseded by the protections and prohibitions of the United States Constitution when West Virginia became a State.

The decisions of the West Virginia Supreme Court of Appeals in *American Barge* and in this case, regarding the nonapplicability of the Northwest Ordinance and the Virginia Compact, are consistent with prior decisions of this Court.

See *Sands v. Manistee River Improvement Co.*, 123 U.S. 288, 295-296 (1887); *Huse v. Glover*, 119 U.S. 543, 546 (1886); *Escanaba Co. v. Chicago*, 107 U.S. 678, 688-89 (1883). *Sands*, *Huse* and *Escanaba* are only three examples of the many cases in which this Court has consistently held that the Northwest Ordinance had no force in a State after its admission into the Union. In all three cases, the Court upheld the right of the state to levy a fee for passage on the river.[6]

---

[6]Typical of the holdings of these cases is the following language from *Sands*, 123 U.S. at 295:

> There was no contract in the fourth article of the [Northwest] ordinance of 1787 respecting the freedom of the navigable waters of the territory north-west of the Ohio river emptying into the St. Lawrence, which bound the people of the territory, or of any portion of it, when subsequently formed into a state and admitted into the Union. The ordinance of 1787 was passed a year and some months before the constitution of the United States went into operation. . . . In some of the acts organizing portions of the territory under separate territorial governments, it is declared that the rights and privileges granted by the ordinance are secured to the inhabitants of those territories. Yet, from the very conditions on which the states formed out of that territory were admitted into the Union, the provisions of the ordinance became inoperative except as adopted by them. All the states thus formed were, in the language of the resolutions or acts of congress, 'admitted into the Union on an equal footing with the original states, in all respects whatever.' Michigan, on her admission, became, therefore, entitled to and possessed of all the rights of sovereignty and dominion which belonged to the original states, and could at any time afterwards exercise full control over its navigable waters except

Even the decisions relied upon by Petitioners support West Virginia's position. In *Economy Light Co. v. United States*, 256 U.S. 113, (1921), the principal case relied upon by Petitioners, the Court stated:

> [A] State formed out of a part of the Northwest Territory has the same power to regulate navigable waters within its borders that is possessed by other States of the Union; that is to say, until Congress intervenes, the power of the State, locally exerted, is plenary; nevertheless, where the navigation serves commerce among the States or with foreign nations, Congress has the supreme power when it chooses to act, and is not prevented, by anything the States may have done, from assuming entire control in the matter.

256 U.S. at 121 (Emphasis added).

The Court in *Economy Light* thus recognized that, to the extent that the policy concerns of the Northwest Ordinance might remain valid as to states in the Union, they have been subsumed within the Commerce Clause, the Supremacy Clause, and the doctrine of federal preemption. The Court in *Economy Light* expressly stated that its holding was consistent with the decisions in *Sands*, *Huse* and *Escanaba*, which held that the Northwest Ordinance had been superseded by the United States Constitution when each former territory entered the Union as a state. 256 U.S. at 121. Insofar as *Economy Light* discussed the Northwest Ordinance it was only for the purpose of supporting the proposition, uncontested here, that the ordinance effectively preserved for Congress the authority to regulate navigable waters and that congressional statutes

---

(...continued)
as restrained by the Constitution of the United States, and laws of Congress passed in pursuance thereof.

BEST AVA

enacted after ratification of the Constitution may not be ignored by the states merely because earlier decisions of the United States Supreme Court held that similar provisions of the Northwest Ordinance were inapplicable to states admitted to the Union.

The facts in *Economy Light*, like the facts in the vast majority of all cases that have dealt with the Northwest Ordinance or the Virginia Compact, involved physical obstruction of the waterways, not taxes. Petitioners can cite to only one case, *Allphin v. Ohio River Co.*, 306 S.W.2d 94 (Ky. 1957), where the Virginia Compact was invoked to invalidate a state tax of any kind, and that case is easily distinguished. The Kentucky court in *Allphin* expressly found that the Virginia Compact was "engrafted into the Constitution of Kentucky as a part of it," and thereby decided the case on State constitutional grounds. In this case, however, Petitioners cannot (and do not) claim that either the Northwest Ordinance or the Virginia Compact was similarly "engrafted into the Constitution" of West Virginia, and Petitioners are thus left without a single case holding that a fuel use (or similar) tax violates either the Northwest Ordinance or the Virginia Compact.

Petitioners' positions regarding the Northwest Ordinance and the Virginia Compact conflict with the basic tenet of federalism that all states are subject to the same level of federal control. See, e.g., *Escanaba*, 107 U.S. at 689 ("Equality of constitutional right and power is the condition of all the States of the Union, old and new"). If the Northwest Ordinance and the Virginia Compact were not superseded by the Constitution, then the result is a difference in the rights of states. States that were included as territories under the Northwest Ordinance and Virginia Compact would be subject to one standard, while all other states would enjoy a different, more lenient, standard under the United States Constitution. The relevant standard for all states must be the federal Constitution, and not two regional documents which, by their own terms, applied only to territories not yet admitted to the Union as states.

LABLE COPY

That the applicable provisions of the Northwest Ordinance and Virginia Compact have been subsumed within and superceded by the provisions of the United States Constitution is illustrated by the case of *Helson v. Kentucky*, 279 U.S. 245 (1929), a case which Petitioners claim is directly on point with this case with regard to the Commerce Clause issue. The issue in *Helson* was the validity of a Kentucky sales tax imposed on fuel used by a ferry traversing the Ohio River. The territory of Kentucky, like West Virginia, was within the geographical scope of the Northwest Ordinance and the Virginia Compact prior to becoming a State. Nevertheless, in *Helson*, neither the Kentucky court nor this Court addressed the applicability of the Northwest Ordinance, the Virginia Compact, or their respective admonitions that the Ohio River should remain "forever free" or "free". Instead, the Courts based their respective decisions solely on the Commerce Clause. Had the Northwest Ordinance and the Virginia Compact been applicable to the fuel use tax in *Helson*, then the Court would have been required to first address those statutes before reaching the Commerce Clause question, given the Court's reluctance to unnecessarily decide Constitutional issues. See, e.g., *Jean v. Nelson*, 472 U.S. 846, 854 (1985) (fundamental rule of judicial restraint requires that courts consider nonconstitutional grounds for decision prior to reaching any constitutional question).

Furthermore, the holdings of cases such as *Sands*, *Huse* and *Escanaba*, which dealt directly with the effect of the Northwest Ordinance and Virginia Compact, have since been cited as examples of policies underlying the Commerce Clause or Duty of Tonnage Clause. See, e.g., *Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 266-67 (1935) (Duty of Tonnage case citing *Escanaba* and *Huse*); *Evansville-Vanderburgh Airport Authority District v. Delta*, 405 U.S. 707, 713 (1972) (Commerce Clause case citing *Huse*). Thus, the commerce concerns once addressed by the Northwest Ordinance and the Virginia Compact when states were still territories are now addressed by the Commerce and Duty of Tonnage Clauses of

the federal Constitution. They do not present independent issues.

However, even if the Northwest Ordinance and the Virginia Compact are still in full effect, West Virginia's fuel use tax is not the sort of tax either document purports to prohibit. The Northwest Ordinance's provision that the territory's navigable waterways should be "forever free" of "taxes, imposts or duties" does not prohibit all charges or taxes. See *Huse v. Glover*, 119 U.S. 543 (1886); *Sands v. Manistee River Improvement Company*, 123 U.S. 288 (1887). The "taxes, imposts and duties" contemplated by the Northwest Ordinance are tolls that are calculated to unreasonably restrict access to navigable waters. West Virginia's use tax on special fuels is not such a tax because it is not designed to, nor does it in fact, restrict access or the right of navigation.

II. Duty Of Tonnage.

Article I, Section 10, Clause 3 of the United States Constitution (the Duty of Tonnage Clause) prohibits the imposition of "all taxes and duties . . . which operate to impose a charge for the privilege of entering, trading in, or lying in a port." *Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 265-66 (1935). Just as the Northwest Ordinance's prohibitions against "taxes, imposts and duties" were not intended to bar the type of fuel use tax at issue in this case, the prohibitions of the Duty of Tonnage Clause also do not bar such a tax.

The fuel use tax is not a duty of tonnage, because it is not a tax on entry into, or navigation upon, the navigable waters of West Virginia. Rather, the tax is levied upon the use of gasoline and special fuel by any motor carrier traveling in West Virginia. Motor carriers such as buses, trucks, and trains -- vehicles that may never come near a navigable waterway during their time in West Virginia -- are subject to the tax. Furthermore, vessels that navigate the rivers of West Virginia

but do not use gasoline or special fuel are not subject to the tax.[7] Thus, the incidence of taxation is clearly not upon navigation on the river, but upon use of gasoline or special fuel by motor carriers, whether on or off the river.

Petitioners' broad reading of the Duty of Tonnage Clause would invalidate virtually any tax which a state might seek to enforce against a commercial user of the state's waterways. For example, the net income tax that was upheld against a Duty of Tonnage argument in *American Commercial Barge Line Co. v. Marcum*, 360 S.W.2d 134 (Ky. 1962), would, according to Petitioners' interpretation, constitute an invalid duty of tonnage because certain barge lines would not be subject to the tax but for their operation on the stretch of the Ohio River that is in Kentucky. The allocation percentage applied to a barge company's net income for purposes of calculating net income tax liability would, in such a case, be totally dependent on the amount of time the company's barges spend on Kentucky's portion of the Ohio River; and, thus, the amount of income tax liability would be in direct proportion to the barge company's use of Kentucky's portion of the river. According to the interpretation urged by Petitioners in this case, such a net income tax would be invalid as a duty of tonnage. This broad reading of the Duty of Tonnage Clause clearly exceeds the prohibition envisioned by the framers of the Constitution.

The Duty of Tonnage Clause is closely related to, and intended to supplement, the Import-Export Clause, which prohibits "imposts or duties" on imports. *Clyde Mallory*, 296

---

[7]The history of navigation on the Ohio River clearly shows that gasoline and special fuel are not the sole sources of fuel for navigating the river. The rivers of the region have seen commerce conducted through canoes and rafts, barges towed by draft animals, and coal or wood fired steam ships. Alcohol, which is specifically excluded from the definition of "special fuel" in W. Va. Code § 11-15-18(c)(9), gets serious attention as an alternative fuel during times of gas shortages.

U.S. at 264-65. Imposts and duties are words that are subject to historical definition, as recognized in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 292-93 (1976) ("The characteristic common to both 'imposts' and 'duties' was that they were exactions directed at imports or commercial activity as such and, as imposed by the seaboard States under the Articles of Confederation, were purposefully employed to regulate interstate and foreign commerce and tax States situated less favorably geographically"). In this case, the apportionment methodology used to determine the amount of fuel used in West Virginia, and the credit provision of W. Va. Code § 11-15A-10a, assure that no multiple taxation occurs, and that "States situated less favorably geographically" are not unfairly burdened. When the historical intent of the Constitution's framers is considered, it is clear that West Virginia's use tax is not a "duty" prohibited by the Duty of Tonnage Clause. See *Michelin*, 423 U.S. at 293-94 ("The terminology employed in the Clause -- 'Imposts or Duties' -- is sufficiently ambiguous that we decline to presume it was intended to embrace taxation that does not create the evils the Clause was specifically intended to eliminate").

Petitioners have not cited to any case which has found a fuel use tax to violate the Constitution's Duty of Tonnage provisions. The West Virginia Supreme Court of Appeals, on the other hand, cited the case of *In re Los Angeles Lumber Products Co.*, 45 F. Supp. 77 (S.D. Cal. 1942) as an example of a case in which a use tax was upheld against a claim that it violated the Duty of Tonnage Clause. Like the federal court in *In re Los Angeles Lumber*, the West Virginia Supreme Court of Appeals in this case recognized that a use tax is a "compensating" tax intended to place those who purchase goods (and pay sales tax) in one state on an equal footing with those who purchase the same goods in another state but use those goods in the taxing state. Such a system of compensating sales and use taxes meets all constitutional requirements as long as it contains a credit mechanism, such as that found at W. Va. Code § 11-15A-10a, so that out of state purchasers do not suffer discrimination. See *Henneford v. Silas Mason Co.*, 300 U.S. 577, 581 (1937).

III. Supremacy Clause And Preemption.

Petitioners claim that West Virginia's fuel use tax is invalid under the Supremacy Clause because 33 U.S.C. § 5 provides, inter alia, that "[n]o tolls or operating charges whatever" may be levied upon watercraft passing through any canalized river. Like the provisions contained in the Northwest Ordinance and the Duty of Tonnage Clause, the prohibition on "tolls or operating charges" found in 33 U.S.C. § 5 does not apply to the sort of broad-based fuel use tax at issue in this case. For reasons already set forth in previous sections of this brief, West Virginia's fuel use tax is not a toll or operating charge which might impede entry to, or navigation upon, the waterways of West Virginia.

The judicial doctrine of federal preemption is an outgrowth of the Supremacy Clause. Generally, federal preemption of state law is not favored, and the focus of the Court's inquiry is always upon whether Congress intended to displace state law. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981). In the courts below, all parties agreed that there is no congressional language expressly preempting a use tax such as West Virginia's. *Hartley Marine*, supra at 604. Accordingly, Petitioner's preemption argument relies on implication; and, more specifically, on the theory of field preemption (as opposed to conflict preemption). Id. The federal government's role in regulating the inland waterways is simply not so all-encompassing or exclusive that it precludes state imposition of a broad-based fuel use tax.

Although the federal government has primary responsibility for the creation, maintenance, improvement and regulation of inland waterways, that responsibility is not absolute or all-inclusive. For example, the states bordering the Ohio River share police responsibility for prosecuting criminal actions on the river. See *Benham v. Indiana*, 637 N.E.2d 133 (Ind. 1994) (Indiana has concurrent jurisdiction with Kentucky to prosecute drunken operation of a motorboat on the Ohio River). The states share fire and rescue responsibility for river traffic. The states also have authority

to make improvements of their own to the inland waterways. See *Sands v. Manistee River Improvement Co.*, 123 U.S. 288, 295 (1887) (state may remove obstructions from rivers and harbors, deepen channels, and improve the waterways in other ways if the free navigation of the waters is not thereby impaired and the federal system of improvements is not thereby defeated). Clearly, the federal government realizes that federal laws regarding various aspects of inland navigable waterways are not threatened by nonconflicting state laws reasonably regulating activity upon those same waterways.

Although the federal government imposes its own excise tax on fuel used by vessels on the inland waterways, the federal government has never claimed or argued that the states cannot impose a similar use tax. Imposition of concurrent federal and state taxes on the exact same income, transaction, goods (including excise taxes on gasoline), inheritances, etc., is common, with no question of whether federal imposition of a tax preempts the states from imposing an identical tax. In this case, Petitioners provide no reason why federal imposition of a fuel use tax should preempt a similar state tax, when such preemption is clearly not the case with other federal taxes.

IV. Commerce Clause.

Petitioners rely on decisions of this Court applying the now obsolete "formal rule" in arguing that West Virginia's fuel use tax violates the Commerce Clause. For instance, Petitioners claim that the facts of *Helson v. Kentucky*, 279 U.S. 245 (1929), are similar to those in this case, and that the decision in that case is thus controlling. Even if the facts were identical, *Helson* would not control the outcome of this case because *Helson* was decided under the "formal rule" which the Court abandoned with its adoption of the four part test set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). (See 430 U.S. at pp. 278-279, wherein the Court overruled *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951); "The rule [of *Spector*] reflects an underlying philosophy that interstate commerce should enjoy . . .

immunity from taxation.") *Helson* was decided at a time in the Court's Commerce Clause jurisprudence when any connection to interstate commerce was fatal to a state tax. The current standard for determining whether a state tax violates the Commerce Clause is now the four part test set forth in *Complete Auto*. Since the adoption of the *Complete Auto* test, which permits, rather than prohibits, a fairly apportioned tax on interstate activity, *Helson* has been cited by this Court only as an example of a bygone era. See *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, at 614 (1981). Likewise, all state courts which have considered the validity of a privilege, sales or use tax as applied to instrumentalities of interstate commerce have likewise characterized the holding of *Helson* as superceded by *Complete Auto*. *Director of Revenue v. Superior Aircraft Leasing Co., Inc.*, 734 S.W.2d 504 (Mo. 1987); *Master Craft Engineering, Inc. v. Dept. of Treasury*, 366 N.W.2d 235 (Mich. App. 1985); *Columbia Gulf Transmission Co. v. Broussard*, 653 So.2d 522 (La. 1995).

Petitioners do not dispute that West Virginia's use tax on special fuel satisfies the first three parts of the *Complete Auto* test,[8] but claim that it runs afoul of the fourth part which requires that the tax be fairly related to services provided by the taxing state. This Court has stated that the relevant inquiry under the fourth prong of the *Complete Auto* test is whether the measure of the tax is reasonably related to the extent of the taxpayer's contact with the taxing state. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 625-26 (1981). In this case, West Virginia's use tax on gasoline and special fuel is levied upon the amount of fuel used in West Virginia. Because the measure of the tax is directly related to the extent of the taxpayer's contact with the taxing state, the tax passes the fourth prong of the *Complete Auto* test.

---

[8]In the lower courts, Petitioners claimed that West Virginia's use tax on special fuel violates the first prong (nexus) as well as the fourth prong of the *Complete Auto* test. See 474 S.E.2d at 607. Petitioners did not contest the nexus issue in their petition for certiorari to this Court.

Petitioners claim that the fuel use tax is a "user fee" because the tax proceeds are dedicated to the State's road fund. Petitioners' argument in this regard is similar to their Duty of Tonnage argument, in that they argue that they receive no direct benefit trackable to the proceeds of the tax. As this Court has held, however, there is no requirement that every tax must support only those State services which directly benefit to the taxpayer. See *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 627 n.16 ("interstate commerce may be required to contribute to the cost of providing all governmental services, including those services from which it arguably receives no direct 'benefit.'").

Furthermore, this Court has previously considered a case in which the proceeds of a state's fuel use tax were dedicated to the building and improvement of state highways, and found that such a tax was not imposed on the privilege of using the highways. *Bingaman v. Golden Eagle Western Lines, Inc.*, 297 U.S. 626 (1936). *Bingaman* was a case decided under the old "formal rule" of the Commerce Clause (rejected by the Court in *Complete Auto*), in which any tax on an instrumentality of interstate commerce was invalid. Citing *Helson*, the Court in *Bingaman* held that, if the tax was a charge in compensation for use of the highways (i.e., a user fee), then it was acceptable under the Commerce Clause; but if the tax was truly a tax on the use of fuel, then it was a tax on an instrumentality of interstate commerce and therefore unconstitutional under the Commerce Clause jurisprudence of the day. Ultimately, the Court held that, regardless of whether the entire proceeds of the tax were devoted to the building and improvement of state highways, the tax was not exacted for the privilege of using those highways. Thus, the mere fact that the proceeds of West Virginia's fuel use tax are dedicated to the State's road fund does not render the tax a user fee for the use of the roads, and Petitioners are therefor not entitled to receive a *quid pro quo* benefit directly from the proceeds of the tax.

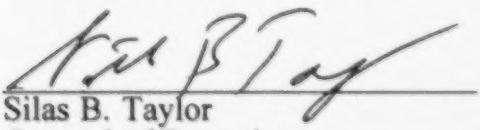
Moreover, even if there was a requirement that each taxpayer must receive a concrete benefit from the application of the tax proceeds, the West Virginia Supreme Court of Appeals expressly found in this case that "we can conceive of numerous instances when this state's road system is used for the benefit, direct and indirect, of [Petitioners]." *Hartley Marine*, supra at 610-11. Furthermore, the benefits which justify a government imposing a tax at all are those "benefits which it has conferred by the fact of being an orderly, civilized society." *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940). Petitioners directly benefit from police, fire and rescue, and other services available to them by virtue of their travelling inside the boundaries of West Virginia, and thus Petitioners do receive a benefit from tax supported services. They have made no effort to show that such benefits are disproportionate to the tax burden imposed upon them.

CONCLUSION

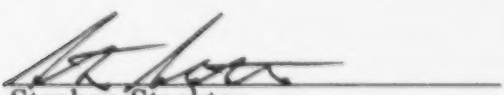
For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Darrell V. McGraw, Jr.
Attorney General



Silas B. Taylor
Counsel of Record
Managing Deputy Attorney General



Stephen Stockton
Assistant Attorney General
State Capitol, Room W-435
Charleston, West Virginia 25305
(304) 558-2522